SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1946

No. 532

MRS. ROBERT LEE TURMAN and CULLEN B. GOSNELL,

Appellants,

v.

J. LON DUCKWORTH, as Chairman of the Georgia State Democratic Executive Committee, et al.

Appellees.

Appeal from the District Court of the United States for the Northern District of Georgia

BRIEF ON BEHALF OF APPELLANTS

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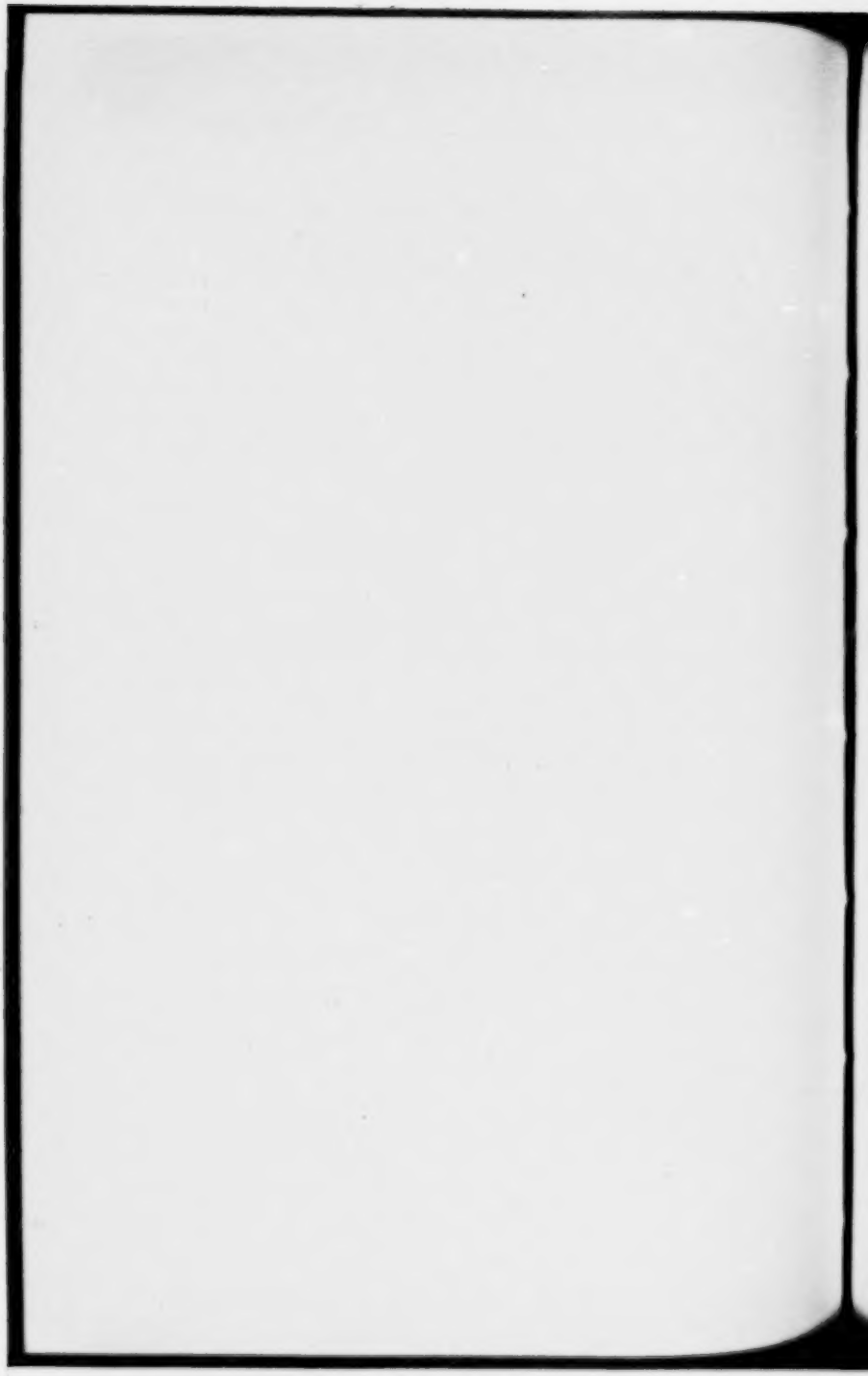

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SUPREME COURT OF THE UNITED STATES

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No. 532

MRS. ROBERT LEE TURMAN and CULLEN B. GOSNELL,

Appellants,

v.

J. LON DUCKWORTH, as Chairman of the Georgia State Democratic Executive Committee, et al.

Appellees.

Brief on Behalf of Appellants

The Opinion Below

The opinion of the three-judge District Court ofthe United States for the Northern District of Georgia, Atlanta Division, has not yet been officially published. However, the opinion, together with the order and judgment denying Plaintiffs-Appellants an interlocutory injunction is set forth in Appendix "E," pages 16-24, of the Statement as to Judisdiction filed by Appellants in this case.

Jurisdiction of This Court

This case is before the Court on a direct appeal from the order and judgment of a three-judge District Court invoked under sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925, c. 299, Section I (43 Stat. 938) (U.S.C.A. Title 28, Sections 345 and 380).

Statement of the Case

The principal question presented on the record in this case is whether voters may be accorded equitable relief by declaratory judgment or injunction in protection of their right of franchise.

The Plaintiffs, duly qualified and registered voters under the laws of Georgia, in a class action in equity attacked the validity of a Georgia statute governing statewide primaries. They sought to have the statute declared unconstitutional and prayed that state and party officials be restrained and enjoined from taking certain steps in carrying into effect the results of a statewide primary held in Georgia on July 17, 1946, under the provisions of the statute which is now under attack. Plaintiffs were residents of Fulton and DeKalb Counties, the first and third most populous counties of the state. Likewise in the aforesaid primary, the largest vote was cast in Fulton County and the third largest in DeKalb County. There are one hundred fifty-nine counties in the state varying in population, according to the 1940 census, from 392,886, in Fulton, to 2,964, in Echols. In the primary mentioned the total vote cast in Fulton County was 84,550. The total vote cast in Echols County was 635. In Chattahoochee County (with a population of 15,138) the total vote cast was 265.

The Constitution of Georgia provides that "... the person having the majority of the whole number of votes shall be declared duly elected Governor of this state ..." [1] The right to vote in "elections by the people" is conferred by the Constitution of Georgia on a class of electors to which Plaintiffs belong.[2] This right is not qualified or limited and applies without regard to any political subdivision or sub-area for election purposes, where the election is one held for state officers. In 1917 the General Assembly of Georgia enacted the statute now under attack. It fully regulates the nomination of candidates for public offices by primaries and provides that candidates for nominations to state offices, including the Governor, and other Statehouse officials "who receive, respectively, the highest number of votes in any given county shall be considered to have carried such county and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the Lower House of the General Assembly... and the candidates for said offices respectively

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1. Article V, Section I, Paragraph III. Constitution of Georgia.
2. Article II, Section I, Constitution of Georgia.

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who shall receive a majority of all the county unit votes throughout the entire state upon the basis above set forth shall be declared . . . to be the nominees of such party . . ." [3] The further provision is made that the names of candidates so nominated shall be certified by party authorities to the Secretary of State who shall place such names on the ballot as candidates in the General Election held in November, which in 1946 falls on November 5th.[4] Nomination by the Democratic Party is, and has historically been, tantamount to election. The Constitution of Georgia designates the number of representatives from the several counties into three classes: eight counties having the largest population, three representatives each; thirty counties having the next largest population, two representatives each, and the remaining counties, one representative each.[5] Provision is made for the apportionment to be changed by the General Assembly at its first session after each United States census.[6] Thus, under the operation of the statute each of the first eight counties has six unit votes in choosing State candidates, each of the next thirty counties has four unit votes and the remaining one hundred twenty-one counties have two unit votes each, regardless of the number of votes which may have been cast in these respective counties.

The Constitution of Georgia has no "equal protection of the laws" provision which could be employed in the protection of civil rights. The present State Constitution as adopted in 1945 confines protection to person and property.[7] The language is the same as that contained in the previous State Constitution of 1877 but is different from that of the

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3. Ga. Laws 1917 pp. 173, 183, 184; 1933 Ga. Code Sec. 34-3212;

4. Ga. Laws 1943 p. 347; Ga. Code Anno. Pocket Part Supp. Sec. 34-3215a.

5. Article III, Sec. III, Par. I, Constitution of Georgia.

6. Article III, Sec. III, Par. II, Constitution of Georgia.

7. Article I, Sec. I, Par. II of Const. of Ga. of 1945 reads: "Protection to person and property is the paramount duty of government, and shall be impartial and complete."

State Constitution of 1868, (as required by Congress at that time to have included language for equal protection of the laws) where in the latter civil rights may have been protected.[8]

Plaintiffs, therefore, brought their action asserting, in effect, that although the Constitution of the State granted them the right of franchise without qualification or limitation, the General Assembly had by enactment of a county unit statute, abridged and practically destroyed that right, in that the scheme of evaluating the ballots in the more populous counties had so devalued and debased their ballots that in the recent State primary it required one hundred and six votes cast in Fulton County to equal one vote cast in Chattahoochee County and so on in varying degrees of disparity throughout the State depending on the ratio of votes cast in the smaller counties with two unit votes and the larger counties with four and six unit votes. Their complaint alleged that they cast their ballots in the Primary for a candidate for Governor who received a plurality of votes cast but not a majority of the county unit vote and that a candidate who received a majority of the county unit vote but not a plurality or majority of the popular vote would be certified by the Party authorities to the Secretary of State as the nominee of the Party unless restrained and enjoined. Plaintiffs' contention in their equitable petition was that this amounted to State action denying them the equal protection of the laws as guaranteed by Section I of the Fourteenth Amendment to the Constitution of the United States. Their suit was allowed filed by the District Judge on August 8, 1946, before the Secretary of State had placed on the ballots for the General Election and transmitted to county authorities for holding the General Election the names of the candidates chosen under this statute. The District Judge, denying a temporary restraining order, convened a three-judge court and this

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[8] Art. I, Sec. II of Const. of Ga. of 1868, in part, reads: "... and no laws shall be made or enforced which shall abridge the privileges or immunities of citizens of the United States or deny to any person within its jurisdiction the equal protection of the laws...."

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Court heard the case on August 23, 1946. Before the date of the hearing and before answer was filed the plaintiffs amended their complaint and showed that the time had then expired within which, under the provisions of other statutes not under attack, the name of any other candidate could be placed on the ballot for the holding of the General Election in November. This amendment further showed that under the Constitution of Georgia the Secretary of State was required after the holding of the General Election to hold in his possession the ballots cast and transmitted to him by the County authorities and to transmit these voting results to the next meeting of the General Assembly (which convenes in Georgia on January 13, 1947) which will declare and publish the results of the election. Plaintiffs accordingly prayed that since the only name of a candidate for Governor which could appear on the General Election ballot would be that of the candidate who in the primary received a majority of the county unit votes but did not receive a plurality or majority of the votes cast in the State and that since such nomination was illegal the balloting on same would be a mere nullity and that the Secretary of State should, therefore, be enjoined from transmitting the voting result of such election to the General Assembly. Thus two measures of relief were claimed: (1) that by declaratory judgment the act be adjudicated as invalid and unconstitutional and (2) that injunctive relief against its enforcement in the particular controversy be granted.

The defenses urged were: that the suit as related to the Secretary of State was, in effect, a suit against the State without its consent; that plaintiffs could have no remedy in a court of equity but were remitted to the legislative and political department of the State government; that plaintiffs were estopped by voting in the primary in which the county unit rule was fixed by law and the rules of the party; that the case was moot; and that the statute was not unconstitutional.

The three-judge Court entered a judgment denying an interlocutory injunction, filed an opinion therewith giving findings of fact and conclusions of law. The Court did not pass on the motions to dismiss but considered them on the general

question of the grant of interlocutory relief, holding that the Courts "shall not meddle unless the duty to do so is plain." No opinion was expressed on the defense that plaintiffs were estopped or that the case was moot or that the suit was primarily one against the State. Apparently these contentions were rejected inasmuch as the opinion of the Court went forward and ruled on the merits not only as above indicated but that the act under attack was constitutional.

Specification of the Errors

The District Court erred as follows:

1. In denying to appellants an interlocutory injunction.

2. In holding that this case is in its general aspects one of party politics.

3. In holding that the decision in *Colegrove v. Green* U. S. Sup. Ct. June 10, 1946, requires the denial of equitable relief to appellants.

4. In holding that there was no showing on the ultimate merits that the State of Georgia has deprived appellants of the equal protection of the laws; and in refusing to hold and declare that the statute under attack expressly discriminated against plaintiffs in according to them only small fractional portions of the rights granted to other citizens and electors, thus depriving them of the equal protection of the laws.

5. In refusing to declare the county unit rule of counting votes (as provided in the Act of 1917, Ga. Laws 1917, pp. 183-189) unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

6. In holding that there is nothing in the Constitution of Georgia that would prevent the Legislature "from stating the conditions on which they (primaries) may be held if the parties elect to have them."

7. In holding "our system of government, State and Federal, has never sought or demanded that each voter should have equal voting influence."

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8. In holding as follows: "But the remedy for these exceptional situations is to be sought through changes in the law, rather than by appeal to courts of equity to upset the law as unconstitutional because of a hardship that has arisen."

9. In its conclusion of law, stated in the following language:

"We conclude on all grounds that an interlocutory injunction should be denied."

The General Nature of the Appellants' Claim

In presenting this brief on behalf of appellants, it will not be contended that plaintiffs' rights initially to vote are derived from Federal source. It will not be contended that resort may be had in protecting the rights of plaintiffs either to that provision of the Constitution which guarantees to every State a Republican form of government, or to that clause of the Fourteenth Amendment to the United States Constitution which guarantees protection against state abridgment of the "privileges and immunities" of the citizens of the United States. The claim will be squarely on the contention that the abridgment of plaintiffs' right to vote is plainly violative of the equal protection clause of the Fourteenth Amendment; that while not federally derived, it is, nevertheless, federally protected; and that although the right to vote has its source in the State Constitution, the right to exemption from discrimination has its source in the Federal Constitution.

It will not here be contended that Fulton and DeKalb Counties are entitled to larger representation in the General Assembly, although it might well be so contended in a proper forum. This is not a suit by or in behalf of counties but is one by individual voters. Instead it will be contended that plaintiffs and the class of voters represented by them in Fulton and DeKalb Counties and other counties are entitled to protection against gross discrimination by State statute. It will not be contended that relief should be granted merely because the state itself suffers great evils from the cunning scheme and device of diluting the effect of large voting

groups. Instead it will be urged that appellants, as plaintiffs in the action brought in the District Court, sought protection against private wrongs; that they sought equitable protection because no relief could be had at law; that this protection was sought under the Federal Constitution and the Civil Rights statute because no such remedies were provided under their own Constitution.

Thus, we seek to eliminate, as belonging more properly to the political field, the more general questions of freedom and equality and the other traditional principles concerned in the founding and history of our representative government. We go so far as to recognize that this Court has spoken of its own inhospitality to cases which belong purely to the political department of government. *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497. We come with full confidence and without fear that the plain and simple question of the abridgment of private rights in such a case as this will be so considered.

The issue in the pending case is more concise, more clearly outlined, more specifically defined than that in any reported case we have found. It provides no questions relating to the construction or application of the law either creating the right or directing the discrimination. The question is clear cut and boils down to this, somewhat as stated above in our first paragraph: Does our system of jurisprudence comprehend respecting suffrage that a court of equity will afford relief in no event and under no circumstances whatever, no matter how plain the right or how conspicuous its invasion? We insist that the present case warrants relief under the severest standards that have yet been set on this subject.

SUMMARY OF ARGUMENT

I.

The District Court had jurisdiction of the parties and the subject matter in this cause.

II.

This Court has jurisdiction in this case on this appeal.

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III.

Under the provisions of the Constitution of the State of Georgia the Plaintiffs-Appellants have the right to vote for Governor and other State House officers in General Elections.

(a) In the grant of this right there is no qualification or limitation except as "electors" are defined.
(b) The right to vote for state officers relates to the whole area of the state and is in no respect qualified or limited by classification to counties or other sub-areas of the state.

(c) The right to vote (by casting ballots) includes the right to have the vote counted on the basis substantially equal in value to the votes of all others enjoying the right.

IV.

Any classification by statute even if allowed by the State Constitution must be upon a reasonable and rational basis and must not set up gross discrimination between groups or classes by counties or other geographical areas.

V.

The Primary Election governed by the statute under attack has been made a part of the public election process and machinery of the state; action under it is state action; nomination in such a Primary is tantamount to election and for the purpose of testing rights of Plaintiffs-Appellants in this case such a Primary must be treated as "an election by the people."

VI.

The statute under attack with its county unit plan was expressly designed to restrict the suffrage of voters in the more populous counties. It grossly discriminates and operates against them and deprives them and those in their class of the equal protection of the laws as guaranteed by Section I of the Four-

teenth Amendment to the Constitution of the United States.

VII.

While this case may concern political action it nevertheless seeks protection of civil rights. It involves private wrongs and not merely a public system. Equity has jurisdiction and the District Court had the power and duty to grant a temporary and interlocutory injunction.

VIII.

The District Court as constituted had the power and duty to declare the Act complained of unconstitutional whether or not Plaintiffs-Appellants were entitled to injunctive relief.

IX.

Plaintiffs-Appellants have no adequate remedy at law by an action for damages or otherwise.

X.

Plaintiffs-Appellants are not estopped by their participation in the primary election.

XI.

The present action insofar as it relates to the Secretary of State is not a "suit against the State".

XII.

It is not too late to grant effective relief nor would it be an improper exercise of this Court's power to do so.

ARGUMENT

I.

The District Court had jurisdiction of the Parties and the subject matter in this cause.

Section 266, Judicial Code, as amended, 28 U.S.C.A. 380;

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Section 24 (14) Judicial Code, as amended, 28 U.S.C.A. 41 (14);

Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759;

Smiley v. Holm, 285 U. S. 355, 52 S. Ct. 397, 76 L. Ed. 795;

Richardson v. McChesney, 218 U. S. 487, 31 S. Ct. 43, 54 L. Ed. 1121.

The foregoing cases are cited as only formal authority for jurisdiction generally of this type of case. There seems to be no challenge of the jurisdiction over the parties. The general challenge that equity has no jurisdiction to grant the relief prayed will be treated more fully in other parts of the brief, particularly under divisions VII and VIII.

II.

This Court has jurisdiction in this cause on this appeal.

Section 266 Judicial Code, as amended, 28 U.S.C.A. 380;

Section 238 Judicial Code, as amended, 28 U.S.C.A. 345.

III.

Under the provisions of the Constitution of the State of Georgia the Plaintiffs-Appellants have the right to vote for Governor and other State House Officers in General Elections.

(a) IN THE GRANT OF THIS RIGHT THERE IS NO QUALIFICATION OR LIMITATION EXCEPT AS "ELECTORS" ARE DEFINED.

(b) THE RIGHT TO VOTE FOR STATE OFFICERS RELATES TO THE WHOLE AREA OF THE STATE AND IS IN NO RESPECT QUALIFIED OR LIMITED

BY CLASSIFICATION TO COUNTIES OR OTHER SUB-AREAS OF THE STATE.

(c) THE RIGHT TO VOTE (BY CASTING BALLOT) INCLUDES THE RIGHT TO HAVE THE VOTE COUNTED ON THE BASIS SUBSTANTIALLY EQUAL IN VALUE TO THE VOTES OF ALL OTHERS ENJOYING THE RIGHT.

Article II of the Constitution of Georgia deals with elective franchise and provides that elections by the people shall be by ballot of those persons qualified and registered and that every citizen of the State who is a citizen of the United States, eighteen years of age or above and not laboring under enumerated disabilities "shall be an elector and entitled to register and vote in any election by the people." [9]

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[9] Const. of Ga. Art. II; Sec. I:

Par. I. Elections by ballot; registration of voters. Elections by the people shall be by ballot, and only those persons shall be allowed to vote who have been first registered in accordance with the requirements of law.

Par. II. Who shall be an elector entitled to register and vote. Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people: Provided, that no soldier, sailor or marine in the military or naval services of the United States shall acquire the rights of an elector by reason of being stationed on duty in this State.

Par. IV. Qualifications of electors. Every citizen of this State shall be entitled to register as an elector, and to vote in all elections in said State, who is not disqualified under the provisions of Section II of Article II of this Constitution, and who possesses the qualifications prescribed in Paragraph II and III of this Section or who will possess them at the date of the election occurring next after his registration, and who in addition thereto comes within

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There is no challenge of plaintiffs' right under these constitutional provisions and they are therefore entitled to become plaintiffs in such an action and to represent members of their class.

It will be noted that the grant of this right of suffrage is in its nature unlimited and unqualified. It is as fully granted to a person in Fulton or DeKalb County as it is to a person in Echols or Chattahoochee County. In its grant it is not limited either to groups or by geographical boundaries, by election areas or by political sub-divisions. Insofar as State Officers elected by the people are concerned, they are named under the language of the Constitution in "elections by the people," i.e., by the people of the whole state. Let it be noted in reference to arguments later to be made that the Governor chosen in "elections by the people" is elected for the whole state of Georgia. He governs the whole state of Georgia as one area, not by counties. His election is statewide as in one election area, not by counties.

Under the Constitution of Georgia it is provided that the House of Representatives "apportion among the counties" as follows: Three members to each of the eight largest

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either of the classes provided for in the two following subdivisions of this paragraph.

1. All persons who are of good character and understand the duties and obligations of citizenship under a republican form of government; or,

2. All persons who can correctly read in the English language any paragraph of the Constitution of the United States or of this State and correctly write the same in the English language when read to them by any one of the registrars, and all persons who solely because of physical disability are unable to comply with the above requirements but who can understand and give a reasonable interpretation of any paragraph of the Constitution of the United States or of this state that may be read to them by any one of the registrars.

counties; two members to the next thirty largest counties; one member to each of the other counties.[10] The residents of a county are the constituents of the representatives of that county. The residents of other counties are not. The Executive Department consists of only one Governor, elected by a majority of the votes in a statewide election. Being an individual, the Governor, of course, cannot be "apportioned among the counties" in fractional parts. His constituents are the entire statewide population. His responsibility runs to each person in the state in the same proportion. This is recognized by the Constitution in requiring his election by a majority of his constituents. When the Legislature undertook by statute to divide the process of electing a Governor into two elections rather than one, the principles above stated apply in the same way to both elections.

The State of Georgia undertook in its Constitution to make classification in at least two important governmental matters. It did not give to its legislature any express authority to make any further classifications in those realms. (1) It classified its residents as to right to vote into registered electors and non-electors. (2) It classified its registered electors into classes territorially, to wit: those residing withing the limits of a prescribed election area, or using language applicable to courts, to those residing within an election "jurisdiction" and those residing outside of that "area" or "jurisdiction." The State, by its Constitution, also classified its officials and created various election areas or jurisdictions for different officials. Some officials it designated as County Officers, some District Officers, some State Officers, whose election or jurisdictional area in each case coincided with the area he has to

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[10] Const. of Ga. Art. III, Sec. III:

Par. I. Number of representatives. The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows: To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each.

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represent or in which he could exercise jurisdiction if elected. It is our contention that those constitutional provisions were (here in the language of the Fourteenth Amendment to the United States Constitution) "laws" to which the equal protection clause applies; thereby preventing the Legislature from interference or further classification involving discrimination between voters in the same election arear.

It seems argument would hardly be required to establish that a person who is granted the right to vote has also by the same grant the right to have the vote or ballot counted. The Constitution did not grant to the citizen in Chattahoochee County the right to vote one hundred six times in the same election and the citizen in Fulton to vote only one time. The General Assembly, however, by enactment of the statute complained of did exactly that by its provision that the whole vote of Chattahoochee County should in the nomination (equivalent to election) count for two votes and the total vote in Fulton County should count for six unit votes in the same nomination. The right to vote as conferred by the Constitution is a fruitless bestowal if the Legislature by statute can render it virtually ineffectual in a particular area. It is only a slight difference of degree if the Legislature, while permitting the vote to be counted, at the same time provides as to a certain class of voters in an unfavored area a vote shall only be counted for .005% of the vote of another in a favored area in the state. The courts have long ago been realistic enough to recognize that this is so. Mr. Justice Holmes in *U.S. v. Mosely*, 238 U.S. 383, 35 S. Ct. 904, 59 Law Ed. 1355, stated: "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in the box." Mr. Justice Black recently stated in the dissenting opinion in *Colegrove, et al. v. Green*, 66 S. Ct., advance sheet July 1, 1946, page 1198, at 1211: "... the constitutionally guaranteed right to vote *and the right to have one's vote counted* clearly imply the policy that state election systems, no matter what their form, should be designed *to give approximately equal weight to each vote cast* ..." (Underscoring or emphasis ours). In another recent case, *U.S. v. Saylor*, 322 U. S. 385, 64 S. Ct.

1101, 88 L. Ed. 1341, this Court as a predicate to upholding the right to Federal prosecution for fraud in state elections, gave its sanction to the doctrine quoted above from Mr. Justice Holmes in the Mosely case (and this doctrine we do not understand the dissent in the Saylor case to have challenged). Mr. Justice Roberts in commenting on the Mosely case pointed out that "The case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted." And further in *Colegrove v. Green*, supra, Justice Black in the dissenting opinion stated: "It (the legislature) can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of 'apportionment' than under any other name. . . . No one would deny that the equal protection clause would also prohibit a law which would expressly give certain citizens a half vote and others a full vote." See also *U. S. v. Classic*, supra, 313 U. S. 290, 61 S. Ct. 1031, 85 L. Ed. 1368.

A significant statement on the same principle is found in the case of *Attorney-General v. Suffolk County Commissioners*, 224 Mass. 598, 113 N. E., 581, where it said: "There can be no equality among citizens if the vote of one county have considerably more weight than that of another in electing public officers."

IV.

Any classification by statute even if allowed by the State Constitution must be upon a reasonable and rational basis and must not set up gross discrimination between groups or classes by counties or other geographical areas.

It is questionable whether since the Constitution of the State fixed the class of voters who could exercise the right of franchise any further classification whatever may be made by the General Assembly. It has been held that constitutional classification is exhaustive and that legislative action in derogation is invalid. *Morris v. Parnell*, 125 Ind. 281, N. E. 221.

In the foregoing case, Elliot, J., in a concurring opinion, wrote: "The general assembly has no power to classify voters

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except as the constitution expressly provides, no matter what system it may adopt. That is so for the invincible reason that the prerogative of conferring and defining the right of suffrage is that of constitution makers and not that of the creatures of constitutions. The electors who frame constitutions, and give being and power to legislatures, are above the created things, and legislators cannot reach above themselves to the source of their power, and the authors of their existence, for the purpose of enlarging or restricting the sovereign right of suffrage. If it were otherwise, legislators would be the masters, and masters they are not. If the legislature can limit or even define the right of suffrage then it is greater than its constituency, but it can do nothing of the kind for the right of suffrage is not subject to legislative power. The right of suffrage is a political right of the highest dignity. It is a right of which, as the courts have declared, no department of government; nor all of them combined, can divest the citizen otherwise than in the mode, and to the extent, expressly authorized by the constitution. *State v. Adams*, 2 Stew. (Ala.) 239."

See also *Brewer v. McClelland*, 144 Ind. 423, 32 N. E. 299.

However, we are not required to assert or maintain that doctrine for a certainty, because unquestionably the General Assembly has no right to wholly exclude one class and admit another in the enjoyment of such a right granted by the Constitution and any sort of classification if permitted must rest upon some reasonable or rational basis. The lower Court in its opinion in this case admitted that under the operation of this statute there was in instances "a glaring inequality" but it would hardly require an adjudication to establish that one voter having his vote counted for one hundred six times more in value than another voter would present the grossest discrimination well to be imagined. The power of the State to classify if it exists under constitutional provision such as we here have under review could not be held to be an unlimited one. To do so would be to hold that the same power could completely destroy. Georgia is the only state in the union which employs such a device as the county unit system.

The lower Court sustained it under the guise that it was "not irrational." A few years ago Tennessee enacted a similar statute which will later be discussed. The Supreme Court of Tennessee readily held it invalid as an irrational classification which denied the equal protection of the laws both under its own Constitution and under the Fourteenth Amendment to the Constitution of the United States. This adjudication was made in the reported case of *Gates v. Long*, 172 Tenn. 471, 113 S.W. (2nd) 388.

It was stated in *Nixon v. Herndon*, supra: "States may do a good deal of classifying that is difficult to believe rational but there are limits . . ." By specific provisions of the Federal Constitution classification which would exclude voters on account of color, race or sex of course have long ago been made and enforced by the Courts in cases which appear cited throughout this brief but forbidden classification is by no means limited to those cases expressly provided for in the constitution. We take it further to be without question that if the legislative enactment instead of debasing the total vote of Fulton county as is now done should provide that all voters living in Fulton and DeKalb Counties should be excluded from participation in primary election for state offices, that these voters could successfully complain and secure relief. The case, of course, cannot be considered as one where there might be merely slight or insubstantial variations in the effect of a vote. The effort at classification under this statute is not to give approximately equal value to votes cast, it is one to see to it that approximately equal value shall be denied.

We have already said in effect that this proceeding was not initiated and is not being maintained in behalf of Fulton and DeKalb Counties as such. It is in behalf of the individuals who have been discriminated against. The lower Court seemed to give some weight to the general power of government to classify its electors for voting purposes, calling attention to the continuous classification in Georgia by which members in the General Assembly were allocated into the three classes already pointed out, page 3 of this brief. The Court further referred to the county unit system as if there were to be found for it a historic pattern in the scheme of representation

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in the National Congress whereby each state, regardless of population, has two representatives in the United States Senate, drawing the further comparison to the system of selecting or allocating the number of presidential electors as among the several states. There are at least two ready answers to this comparison which at once show that it in no way bears upon the question now before the Court. What may be written, as was done by the great compromise in founding this republic, into the pact between the states, represented by the Constitution of the United States and what has been written in the Constitution of Georgia on the subject of classification is upon a wholly different basis from what a legislative body with limited power may do in derogation of the very provisions of the Constitution. It is again to be borne in mind that the Constitution of Georgia classified its voters and electors. That classification for voting for State offices was not by sub-areas but for the whole State of Georgia. It granted no powers to the General Assembly of Georgia to make any further classification. Even the Electoral College by providing that the largest percentage of its membership shall be distributed in accordance with the population was aimed at the general purpose of equality between the citizens. The adding of two members from each state, symbolizing the two Senators, has only slight effect in the ultimate result.

The action in this case is not merely to rid the State of an evil and invalid electoral system but is one that seeks to strike down a statute plainly and deliberately discriminating against appellants as a class. Appellants are not complaining that Fulton or DeKalb County has only six unit votes but rather that appellants as individual voters and those in the class represented by them may exercise only a fractional part of their right. They complain that they are allowed only a fractional part of the voting effectiveness accorded by the statute to other voters in the statewide voting area. The system of giving effect to county lines in evaluating votes is highly discriminatory in that the Constitution of Georgia gave to each voter the same right. The particular number of votes any county has is merely illustrative of the extent of the discrimination caused by the county unit system.

The fact that this scheme affords a means of virtual disfranchisement to racial and religious minorities, obviously located in the more populous centers and industrial areas, is not the basis of plaintiffs' claim but affords abundant illustration of the extent to which plaintiffs are deprived of their right and is arresting evidence of the necessity to find refuge in the fundamental guarantees of the Federal Constitution.

V.

The Primary Election governed by the statute under attack has been made a part of the public election process and machinery of the state; action under it is State action; nomination in such a Primary is tantamount to election and for the purpose of testing rights of Plaintiffs-Appellants in this case such a Primary must be treated as "an election by the people."

Perhaps it may be properly said that no action similar to this has been previously brought in Georgia for the reason that prior to the decisions of the Court in *U. S. v. Classic* and similar cases it had been the popular belief, as had been held in *Grovey v. Townsend*, 295 U. S. 45, 55 S. Ct. 622, 79 L. Ed. 1292, that this nominating device enjoyed a special immunity from legal attack under the claim that party primaries were purely voluntary and autonomous and while many courageous leaders of political thought had worked at the problem and occasionally had made sallies in the direction of breaking down this immunity, the beachhead was never really established until the line of cases referred to, *U. S. v. Classic*, and similar ones, had been decided. Finally and specifically with reference to the primary statutes of Georgia, that is, the whole comprehensive scheme under which primaries are held, including as its principal hallmark the county unit system here under attack, it was held in *King v. Chapman*, 154 Fed. 2nd, 460, 464,.....U.S....., 66 S. Ct. 905,.....L. Ed.....(certiorari denied): "This act appears in large measure to take such primaries out of the control of the parties initiating them, and to substitute the state's

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will in determining the mode of choice of the party nominee . . . "

". . . We think that the provisions show that the State, through the managers it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery. The exclusions of voters made by the party by the primary rules become exclusions enforced by the State and when these exclusions are prohibited by the Fifteenth Amendment because based on race or color, the persons making them effective violate under color of state law a right secured by the Constitution and laws of the United States within the meaning of the statute which is here sued on."

Thus, although there is abundant authority in State and Federal jurisdiction back of this principle, it would seem that the case is no longer open to contention that the state may through the device of legislation controlling the primaries abridge or deprive plaintiffs of their voting rights. This is manfestly true in a state where as in Georgia the nomination is controlling and tantamount to election. As stated in *People v. Fox* (Supreme Court of Illinois) 294 Ill. 263, 128 N.E., 505: ". . . the right to choose candidates for public office whose names are to be placed on the official ballot has been held as valuable as the right to vote for them after they are chosen and is of precisely the same nature." That case which cited as authority *Sherman v. People*, 210 Ill. 552, 71 N. E. 618, dealt with an act of the state legislature regulating primaries on a scheme of counting by districts similar in principle to the county unit plan. It held that for small areas to be thus given "an equal, unbalanced and controlling power" destroyed the equality and freedom of elections and discriminated against electors similarly situated and in applying a constitutional provision "that all elections shall be free and equal" made use of the judicial power to reach the nominating process in primaries as readily as would be in the case of General Elections.

In reviewing cases of discrimination through limiting devices incorporated in primary laws, this Court in *Smith v. Allwright*, 321 U. S. 649, 661, 64 S. Ct. 757, 88 L. Ed. 819,

said: "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State like the right to vote in a General Election is a right secured by the Constitution.

> *United States v. Classic*, 313 U. S. 299, at 314, 61 S. Ct. 1037, 85 L. Ed. 1368; *Meyers v. Anderson*, 238 U. S. 368, 35 S. Ct. 932, 59 L. Ed. 1349; *Ex parte Yarbrough*, 110 U. S. 651, 663 et seq., 4 S. Ct. 152, 158, 28 L. Ed. 274."

In *Nixon v. Herndon*, supra, Mr. Justice Holmes states:

> "If the defendant's conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

It is also to be remembered that in *Nixon v. Herndon*, supra, relief was granted against discrimination in a primary where a unanimous opinion by this Court was rendered finding it unnecessary to apply the Fifteenth Amendment although the discrimination was by reason of race. It was there stated that no more obvious violation of the equal protection clause of the Fourteenth Amendment could well be imagined.

Applying the foregoing principle to the case now at hand it is seen that appellants were granted under the State Constitution the right to vote "in elections by the people" for State officers without qualification or limitation either as to race, color, sex or geography. The General Assembly in derogation of that right sought to prescribe by indirect means by a provision that would give a certain class of voters only a slight percentage of the vote, which obviously they could not have directly accomplished.

VI.

The Statute under attack with its county unit plan was expressly designed to restrict the voters in the more populous counties. It grossly discriminates and operates against them and deprives them and those in their class of the equal protection of the

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laws as guaranteed by Section I of the Fourteenth Amendment to the Constitution of the United States.

We are attaching as an Appendix (Exhibits 1-7) a compilation of the voting results in the primary election of August 17, 1946, and illustrations by graphs and symbols showing the extent of discrimination among voters provided by the statute under attack. These exhibits show the extent of the discrimination with reference to each of the one hundred and fifty-nine counties. Exhibit 3 shows that under operation of the system in the most recent primary it required 14,092 votes in Fulton County to equal one unit vote out of a total of four hundred ten in the choice for Governor; that in Chattahoochee 132 votes equalled one unit vote. In Brantley County 750 votes offset Fulton's 14,092; in Burke County 686 votes equalled Fulton's 14,092, DeKalb's 4,462 and Chatham's 6,751. It shows also that this sort of discrimination does not occur merely in isolated cases but that it is the rule rather than the exception. Exhibit 5 shows that in the recent primary the candidate supposed to have been nominated received 42.96% of popular votes cast in the "election by the people" with 59.02% of the unit votes cast. Another candidate received 45.30% of the popular vote cast and only 35.61% of the unit vote provided under the statute. Exhibit 6 also discloses that under the operation of this system at least in one instance within the past fifteen years a candidate for Governor could have gone into office with only 4.34% of the popular votes cast and in 1942 a candidate for Governor under the compulsion of this system could have gone into office with only 14.87% of the popular votes. In order to fully appreciate the sweeping and shocking extent of discrimination complained of, we invite and urge the Court to examine the graphic illustrations attached in this appendix.

Does a state statute providing this kind of scheme of debasing and diluting the votes of one class and giving undue, unbalanced and inflated value to the votes of those in another class violate that clause of the United States Constitution as amended which provides that "No State shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; . . . ; nor deny to any person within its jurisdiction the equal protection of the laws."?

In support of their contentions that no substantial Federal question is involved in this case, appellees have cited and apparently relied upon cases such as *Minor v. Happersett*, 88 U. S. 162, 21 Wall. 162, 22 L. Ed. 627, *Ex parte Yarbrough*, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274, and have taken the position in this case that since the right of suffrage which plaintiffs seek to protect does not stem from a Federal source it is not entitled to Federal protection. But the doctrine with reference to protection and enforcement of rights arising under the Constitution and laws of the United States in which appellees have taken doubtful comfort applies only to the privileges and immunities clause of the Fourteenth Amendment quoted above, not to the equal protection clause. Otherwise the discrimination practiced against Nixon by State action would not have been condemned by unanimous decision of this Court in *Nixon v. Herndon*, supra. The adjudication there rested not on the Fifteenth Amendment nor upon the privileges and immunities clause of the Fourteenth Amendment but upon the equal protection of the laws clause, it being stated that it was unnecessary to consider the Fifteenth Amendment "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." It is to be remembered that no new rights were conferred on citizens by these two land-marking amendments, they merely expressly and specifically prohibited abridgment and discriminations by the States. A federally derived right is different from a federally protected right. The equal protection clause of the Fourteenth Amendment is not dependent upon the right (protection of which is denied by State action) being a right granted by the Constitution or laws of the United States. "The laws" which must be administered equally are state laws — with Federal protection against discrimination. "While the right to vote comes from the State . . . the right of exemption from the prohibited discrimination comes from the United States," 29 C.J.S. page 28; *Judice v. Village of Scott*, 168 La., 111, 121 So. 592;

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certiorari denied 280 U. S. 566, 50 S. Ct. 26, 74 L. Ed. 620. In *State v. Edwards*, 95 W. Va. 599, 122 S.E. 272, is was held that while the right of suffrage is not an inherent right of citizenship, yet when it is granted to a class of electors it may not be abridged or denied to members of that class by legislative enactment; that once conferred it may be protected as having the same dignity as the more fundamental rights which are inherent.[11]

So Mr. Cooley in his work on Constitutional Limitations, Section 1358-1370, after stating "Wherever the constitution has prescribed the qualifications of electors they cannot be changed or added to by the legislature or otherwise than by amendment of the Constitution," and recognizing the right of the legislative body to make reasonable regulations for the exercise of the right of franchise, says: "All regulations of the elective franchise however must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote or unnecessarily to impede its exercise; if they do they must be declared void." In *McPherson v. Blacker*, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869, wnere

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11. "It is true, as argued by counsel for the State, that the privilege of voting is not inherent or a natural right which exists in the absence of constitutional or legislative grant; but it is equally true, that when such right has been granted by the constitution of the State, it cannot be denied or abridged by legislative enactment. 20 C.J. 62; 9 R. C. L. 980; 7 Ann. Cas. 665; 10 Am. & Eng. Enc. Law, 569; Cooley's Const. Lim. (7th Ed.) 99,902. And it has been said that the right to vote is one reserved by the people of the state to members of a class, and when so reserved by constitutional enactment the right is guaranteed to the class of persons named, and is thus given a dignity not less than any other of many fundamental rights. State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N. W. 1041, 35 L. R. A. (N. S.) 353; 9 R. C. L. 980." State v. Edwards, supra.

legislation affecting the right of voters was under consideration, this Court through Mr. Chief Justice Fuller stated: "The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States but the last has been. *United States v. Cruikshank,* 92 U. S. 542; *United States v. Reese,* Id. 214. . . . The right to vote intended to be protected refers to the right to vote as established by the laws and Constitution of the state . . . The object of the Fourteenth Amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens but not to radically change the whole theory of the relations of the state and federal governments to each other and of both governments to the people. *In re Kemmler,* 136 U. S. 436, 10 S. Ct. Report 930.

"The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. *Milling Company v. Pennsylvania,* 125 U. S. 181, 188, 8 S. Ct. Report 737."

In *Gulf C. & S. F. Railway Co. v. Ellis,* 165 U. S. 150, 17 S. Ct. 255, it was stated at page 258:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo v. Hopkins, 118 U. S. 356, 369, 6 Sup. Ct. 1064, 1071: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official

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action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.' "

Reference has already been made to an effort to establish a similar county unit system in the State of Tennessee. The consequences of legislative action under which voters in the large counties of Tennessee would be penalized by having their votes in state elections count for only a fractional part of votes in smaller counties reached the Supreme Court of Tennessee in the case of *Gates v. Long*, 172 Tenn. 471, 113 S. W. 2nd, 388. Plaintiff voters in an equity case there sought, among other things, a decree holding that county unit scheme unconstitutional as violative of the equal protection clause of the State Constitution of Tennessee and the Fourteenth Amendment to the United States Constitution. There, almost in the same language as in the statute now under discussion in this case, it was provided "for the purposes of this action the county unit basis shall mean that the candidate who receives the highest number of popular votes in any given county shall be considered to have carried such county and shall be entitled to the full county unit vote of such county." Then after providing that "each county shall have as its county unit vote that number of votes divided by one hundred which such county in the last General Election cast for the party nominee for Governor" added the further provision that "the maximum county unit vote any county irrespective of total vote cast shall be 1/8 of 1% of the population of such county . . .", thus establishing a high degree of preference for the benefit of voters in small counties as compared to those in the more populous ones. The Tennessee Supreme Court found no difficulty in holding that such an action by debasing the value of a class of individual votes (in the more populous counties whose combined vote was given an arbitrary limit in weight or value) was an arbitrary abridgment of their rights. The attack on the statute was fully

sustained.[12] Another case mentioned above in connection with the subject of classification is that from the Supreme Judicial Court of Massachusetts, *Attorney General v. Suffolk County Commissioners*, 224 Mass. 598, 113 N.E. 581. There the Court had before it actions for mandamus and bill in equity to determine the validity of action taken by Commissioners in setting up election districts and apportioning the number of representatives in the state law making body under provisions of the State Constitution securing equal rights of all qualified voters to elect public officials. On the merits of the controversy it was held that the discrimination was clear — "the inequality is gross and palpable and extends to a considerable number of districts." Here the records showed only slight discrimination as compared to that in case under consideration. The Constitution of Massachusetts had not provided for representation in their General law making body but had prescribed that in doing so the legislature should observe set standards of equality based upon the

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[12] 113 S.W. (2) 391, (2) "With respect to their right to vote in the primary elections of their party, the Supreme Court in the Texas cases has three times said that citizens were entitled to the protection of the 14th Amendment to the Federal Constitution. Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759; Nixon vs. Condon, 286 U. S. 73, 52 S. Ct. 484, 76 L. Ed. 984, 88 A.L.R. 458; Grovey v. Townsend, 295 U. S. 45, 55 S. Ct. 622, 79 L. Ed. 1292, 97 A.L.R. 680. For the same reason they would be entitled to the protection of Section 8 of Article I and Section 8 of Article II of the Constitution of Tennessee, the equal protection of the Law. That is to say, the state can not confer this right upon one class of voters and deprive another class of voters of such right unless the discrimination can be justified on some rational basis." "Neither, we take it, can the state without reason abridge this right in one class of voters and leave the right whole in another class of voters. The one-eighth of one per cent limitation in those counties which it reaches amounts to excluding some of the voters from their party's primary or of debasing the ballots of all the voters."

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number of voters in the respective districts. The test there to be applied was the same as the one required by the present case. The ratio of discrimination was no more than instances of two or three to one—nothing approaching one hundred and six to one or forty or more to one, etc., as in the present case. After rejecting the claim that the Court should not lend its aid because political questions were involved it was stated:

> "It has been argued ably in behalf of the Commissioners that the grave results which will follow from declaring the report null and void should cause hesitation in sustaining the petitioner's contentions. These considerations may be entitled to weight in determining whether a constitutional mandate has been violated. But, when once it has become evident beyond a doubt that the constitution has been infringed and that rights indisputably secured by it have been trampled, then there is no other way but to maintain the constitution when relief is promptly sought. No consequence of adherence to the constitution can be so evil as a failure to abide by its terms under the circumstances here disclosed. 113 N. E. 587 (6)."

In the Commonwealth of Kentucky where the Constitution required representative districts to be approximately equal in proportion, certain citizens and taxpayers brough an equitable proceeding attacking an act of the General Assembly as providing districts grossly unequal. *Ragland v. Anderson*, 125 Ky. 141, 100 S. W. 865. The Court there said: "Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchal or monarchial. Without equality Republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit. To say that a man in Spencer County shall have seven times as much influence in the government of the State as a man in Ohio, Butler or Edmondson is to say that six men out of every seven in those counties are not represented in the government at all. They are required to submit to taxation without representation." While the last mentioned case related to apportionment of representation in the legislative

body of the government, the statute involved was being measured under a constitutional requirement that the districts be established to attain equality among the voters.

On the general subject of elective franchise attention is called to an opinion written by a District Judge (Northern District of Texas, 1881) in the case of *United States v. Slater*, 4 Woods 356, which has been often cited in various courts of the country, it was there said:

> "Our government is founded on the elective franchise. The right to exercise this franchise is declared, defined and guaranteed by organic provisions superior to any of the departments of the government. The legislature cannot enlarge it or restrict it, and can only regulate it so far as their authority to do so is expressly, or by necessary implication, given in the constitution. Much less may the courts presume to restrict it by construction. On the contrary, the whole spirit of our institutions constrains the courts to give our organic provisions, on the subject of the enjoyment of the right of suffrage, such a construction as will permit the most liberal exercise of this supreme right which is at all reasonably consistent with the terms of those provisions. . . ."

If Plaintiffs in this case, as electors under the State Constitution, had been wholly denied the right to cast their ballot, they would clearly have been entitled to maintain an action for damages.

Nixon v. Condon, 286 U. S. 73, 52 S. Ct. 484, 76 L. Ed. 984;

Lane v. Wilson, 307 U. S. P. 268, 59 S. Ct. 872, 83 L. Ed. 1281;

King v. Chapman, 62 Fed. Sup. 639, 154 Fed. 2d 469, certiorari denied.....U. S.....; 66 S. Ct. 905, ...L. Ed.....;

Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 819;

Swafford v. Templeton, 185 U. S. 487, 22 S. Ct. 783, 46 L. Ed. 1005.

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This sort of recovery would have been allowed because the action of State or party officials by reason of the state statute under which such action was taken, would have been to deprive them of equal protection under the laws. We say again that if the statute, instead of taking from the sum total of the votes cast in Fulton and DeKalb Counties and therefore from each of the votes making up this total, had provided that all qualified voters North of Macon or North of Atlanta should be excluded from participation in the choice of a candidate for Governor it would hardly be contended that this did not violate their constitutional guarantees by denying them equal protection of the laws. Legislation by the State on the subject of franchise is no more exempt from the test under equal protection of the laws than legislation on any other subject and that subject need not be Federal in character. Laws making certain acts crimes must be uniform and applicable to all the people of the State. This would be true as to legislative representation, rights of free education and so on in the whole field of the law.

VII.

While this case may concern political action it nevertheless seeks protection of civil rights. It involves private wrongs and not merely a public system. Equity has jurisdiction and the District Court had the power and duty to grant a temporary and interlocutory injunction.

The District Court held this case to be one of "party politics" and one in which courts either could not or should not "meddle" by granting relief. Here lies the main attack made on the case. At the outset we give full recognition to the so called traditional doctrine that equity is loathe and hesitant to lay its heavy hand on processes normally at work in the political department of government. In *Colegrove v. Green*, ... U. S. ....., 66 S. Ct. 1198, Advance Sheet, July 1, 1946, 90 L. Ed. 1242, in speaking of the reluctance and frequent refusal of the Court to interfere in purely political controversy, Mr. Justice Frankfurter very recently stated: "It has refused to do so because due regard for the effective working of our government revealed this issue to

be of a peculiarly political nature and therefore not meet for judicial determination," saying at another point, page 1201, that "the Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and ultimately on the vigilance of the people in exercising their political rights." We are not asking that these principles be revised or modified. Full relief may be had by appellants without doing violence to these principles. What we do ask is that the Lower Court's ruling that the present case is one of party politics and therefore subject to the application of that rule be reversed. We have abundant grounds for so asking quite within the bounds of precedent. Perhaps it may be as well to consider at once the recent case of *Colegrove v. Green*, supra, for it deals in a large measure with that question and at the time this is being written the case is still pending in this Court on motion for rehearing. Whatever may be said about the final judgment in that case it does not control this case, although the distinguished Judges who delivered the opinion in the District Court were of the opinion that it did. The District Court in the Colegrove case ruled against petitioner because it felt bound by this Court's opinion in *Wood v. Broom*, 287, U.S. 1, 53 S. Ct. 1, 77 L. Ed. 131. Three of the Justices of this Court felt that view was correct, stating that "we could also dispose of this case on the authority of *Wood v. Broom*. The legal merits of this controversy were settled in that case . . ." Now *Wood v. Broom* has no real bearing on the case here under consideration. It involved a congressional reapportionment act and brought into question whether or not certain Federal legislation was still of force. Four of the Justices of this Court had in *Wood v. Broom* been of the opinion that it should have been disposed of "for want of equity." Three of the Justices participating in *Colegrove v. Green* were of the same opinion, pointing out that the basis of the Colegrove suit was not a private wrong "but a wrong suffered by Illinois as a polity" and also gave heavy emphasis to the fact that the Federal Constitution had lodged in the Congress final power over the subject of congressional representation. So there is nothing in that portion of the opinion which in the least precludes

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judgment favorable to appellants in this case. Three of the Justices, speaking in the opinion by Mr. Justice Black, were of the view that the case was appropriate for equitable relief and that the state in carrying out its plan for representation in the Congress had fallen under the prohibition of the Fourteenth Amendment. These Justices apparently took the view also that the rights asserted were private personal rights and that the action was not merely in the interest of the State of Illinois. It would hardly be doubted that the opinion of Mr. Justice Black fully sustains the rights of appellants in this case and would authorize the relief they seek. We believe it a fair appraisal of the position taken by Mr. Justice Rutledge in the Colegrove case to say: He rejected the view that Congress was given the final authority in the premises; he conceded that equity had the power to deal with such a situation but was of the opinion that since, if relief were granted and corrective legislation were not provided by the State of Illinois it would entirely lose the right to district representation in Congress, the Court should exercise its discretion and withhold equitable relief. Not because of want of power but because of practical results. There are no such difficulties in the present case. If the statute is plainly unconstitutional and if the rights of plaintiffs which are invaded are substantial, as we believe has been demonstrated, to so adjudicate would not be crossing any forbidden line or entering indelicately into the political department of Georgia's government. In the case of *any* State statute which violates the Federal Constitution, if it becomes necessary for the Federal Courts to so adjudicate, there is some impact upon the government. Either the State legislature must in such case withhold future legislative action or must in future legislation on the subject conform to the Constitution. In the present case, based upon the unconstitutionality of the statute and the rules which it is visiting upon plaintiffs and their representative class, we have asked that the State and party officials charged with the carrying out and consummating its illegal results be enjoined. The last step to be taken in this process and not to be done until January 13, 1947, is the transmission by the Secretary of State to the Georgia General Assembly of the ballots containing the

name of the candidate for Governor illegally nominated and illegally elected. It has been contended by appellees that by seeking to stop the operation of this statute at this stage we are thus in purpose and effect seeking to control the action of the General Assembly because of their duty to declare and publish the results of the election for Governor when the returns are received by them from the Secretary of State. But we do not. What the legislature may do when it finds there were no returns submitted to it, because the only candidate permitted to be on the ballot was placed there by the operation of an illegal statute, is entirely up to the legislature in its own competence to decide. No chaos could result in this case, such as pointed out in the Colegrove case, irrespective of what might later be done. The Constitution of Georgia provides that the present Governor would continue to hold office until his successor is duly elected and qualified.[13]

Of course this case concerns political rights and political action but if it be a right it is nonetheless a right and, we submit, nonetheless valuable on that account. Mr. Justice Black points out in *Colegrove v. Green*, supra, that: "Federal Courts have not hesitated to exercise their equitable power in cases involving deprivation of property and liberty. *Ex Parte Young*, supra; *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423. There is no reason why they should do so where the case involves the right to choose representatives that make laws affecting liberty and property."

Perhaps overworked by repeated quotation, is the celebrated statement of Mr. Justice Holmes in *Nixon v. Herndon*, 273 U.S. 536, 47 S. Ct. 446, 71 L. Ed. 759, "The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns

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[13] Article V. Section I. Paragraph I. Constitution of the State of Georgia: "Governor; Term of Office; Salary, etc. The executive power shall be vested in a Governor, who shall hold office during the term of four years, and until his successor shall be chosen and qualified . . ."

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political action but it alleges and seeks to recover for private damage and that private damage may be caused by such political action and may be recovered in a suit at law hardly has been doubted for over two hundred years." In the earlier case of *McPherson v. Blacker*, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869, already referred to, the Court said: "The question of this act as presented to us by this record is a judicial question and we cannot decline to exercise our jurisdiction upon the inadmissible suggestions that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state, as revised by our own." That case, it will be remembered, dealt with the delicately political subject of the method chosen by a state for the selection of presidential electors and the objection was there, as here, made that only political questions were involved and that the Court had no power to dispose of them. In rejecting that contention this Court said: "But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States and this is a case so arising since the validity of the state law was drawn in question as repugnant to such Constitution and laws and its validity was sustained. *Boyd v. State* 143 U.S. 135, 12 S. Ct. 375." A strong statement of a State Court on the same subject is taken from the case of *Attorney General v. Suffolk County*, supra, as follows: "The right to vote is a fundamental personal and political right. Unlawful interference with the right to vote, whether on the vote of public officials or private persons is a private wrong for which the law affords a remedy although it may also have significant political results. Any act of the legislature limiting or in any way interfering with this right would be invalid. While the right to vote for members of the legislature is in a sense a political right it is also a precious personal right . . . The circumstances that political considerations may be connected with rights affords no justification to Courts for refusal to adjudicate causes rightly pending before them. Such a controversy even though political in many of its aspects is of judicial cognizance." (224 Mass. 598, 113 N.E. 584).

Cooley, Principles of Constitutional Law, p. 263, says: "Suffrage is not of right, but it is granted by the State on a

consideration of what is most for the interest of the State. Nevertheless, the grant makes it a legal right until it is recalled and it is protected by the law as property is . . ."

Mr. Chief Justice Stone in delivering the opinion of this Court in *Snowden v. Hughes*, 321 U.S. 1, cited *McPherson v. Blacker*, supra, *Nixon v. Herndon* and *Nixon v. Condon*, supra, in support of the proposition that "where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." Although in the Snowden case the action was by a candidate himself, a recovery would have been allowed under the equal protection clause, except that instead of attacking a statute violative of the equal protection clause the plaintiff sought relief under the statute and failed to sufficiently show discrimination. We feel fully authorized to urge that the Snowden case alone is ample authority for the position we are here maintaining.

The case of *Giles v. Harris*, 189 U.S. 475, 23 S. Ct. 639, 47 L. Ed. 909, has been relied upon by appellees as authority against the position here taken. We do not find anything in that case which weighs very heavily against the claim of appellants. It is true that the statement is there made that "the traditional limits of proceedings in equity have not embraced a remedy for political wrongs" but that case was decided on the reasoning that quite aside from the question of extending "the traditional limits" of jurisdiction in equity, there was really nothing which as a practical matter equity could do for plaintiffs who had sought to compel their registration as voters for a particular election. It was also believed in that case that to grant relief would amount to policing the elections in Alabama. It was also pointed out that they sought relief under a State Constitutional provision which they attacked as invalid. In any event the ruling in that case was not considered such as to prevent the pronouncement of principles quoted above from *Snowden v. Hughes* nor was it regarded as interfering with the relief granted in the case of *Smiley v. Holm* 285 U.S. 355, 52 S. Ct. 399, 76 L. Ed. 795. The Smiley case is fully discussed in briefs and in the opinion *Colegrove v. Green*, supra, to-

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gether with the two other cases controlled by it *Koenig v. Flynn* 285 U.S. 375, 52 S. Ct. 403, 76 L. Ed. 805, and *Carroll v. Becker, Secretary of State of Missouri,* 285 U.S. 380, 52 S. Ct. 402, 76 L. Ed. 807. In that case as in the present one, suit was brought by a citizen and elector of the state. It was there sought to obtain a judgment declaring invalid filings for nomination for the office of Representative in Congress. Plaintiffs' case was demurred to on the ground, among others, that the asserted inequality presented a political and not a judicial question. The history and result of that case has been too fully considered to require more than mere mention to show that we can come clearly within its ruling. In fact, it is submitted, we present a much stronger case — a statute which on its face plainly and deliberately provides for, aims at and accomplishes gross discrimination against an equal enjoyment by a particular class of the right of franchise. Plaintiffs there sought injunctive relief which had been denied them. This Court by a full bench, with the exception of Mr. Justice Cardozo who took no part in the case, reversed the Lower Court.

In an older case, that of *Boyd v. State of Nebraska, ex rel. Thayer,* 143 U.S. 136, 12 S. Ct. 375, 36 L. Ed. 103, this Court has dealt with a case involving title to the office of Governor of Nebraska. That case originated in the State Court. A Federal question was made by a challenge of Boyd's citizenship involving his alleged failure as an alien to become naturalized. This Court reached the conclusion that Boyd was not disqualified to hold the office of Governor, that is, they decided the question that he was a citizen within the meaning of the Federal Constitution and reversed the Lower Court, although the result was to oust the person holding the office of Governor and to place Boyd in office.

In the case of *Mitchell v. Wright,* 154 Fed. 2nd, 924, petitioner was seeking declaratory judgment and an injunction against an election official as well as damages. The District Court had dismissed his complaint on another ground but the Fifth Circuit Court of Appeals found no difficulty in reversing the case with its approval of the relief sought. The same result was reached in *Hall v. Nagel* 154 Fed. 2nd 931.

Civil rights by the Amendment to the Federal Constitution were, we submit, made fully as important as the rights of persons and property. Yet the State Constitution of Georgia has not expressly incorporated that provision. In its provisions as to the paramount duty of government which shall be "impartial," no rights are included except those of person and property.[14] The right to vote is invaluable. It is the very basis of our form of government that every voter in a given election area should stand on an equal footing. The judicial code of the United States recognizes the non-monetary nature of this right by stating that no monetary "amount involved" need be stated as in other cases.[15] Civil rights cases are in a class by themselves. (1) They do not require a jurisdictional amount. (2) They are not like criminal cases where the defense can be set up at the trial of the indictment. (3) They are not like property cases where values can be expressed in money. They are more like "heirloom" cases in specific performance. (4) Haste is sometimes necessary, as in the instant case, because once the right is lost it cannot be retrieved or adequately redressed. It is an irreparable wrong when once completed. Moreover the provisions of the Fourteenth Amendment are that rights shall be "protected." Protection is something more than allowing the rights to be taken away and then recompense being made therefor. It involves shielding the rights from invasion, not compensating therefor. The nature of the right is such that unless preventative relief is given the right is lost forever. The assurance of a right to vote in the next election will not be the same as protecting that right in the pending action. The wrong in this case is not yet completed, as it would have been if the plaintiffs had offered to deposit a ballot on the 17th day of July and had been refused. That wrong would have been finally consummated when the polls closed. The District Court was not asked to supervise any election or to recount votes or to

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[14] Article I, Sec. I, Par. II, Constitution of Georgia.
"Protection the duty of government. Protection to person and property is the paramount duty of government, and shall be impartial and complete."

[15] Judicial Code, Sec. 24 as amended 28 U.S.C.A., Sec. 41 (1).

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decide an election contest or to decide how the November election should be held. The only question was, and is, should a man who by operation of an unconstitutional statute received the majority of the county unit vote though less than the majority of the individual vote, be submitted to voters in the November election as the Democratic and (only) candidate. The answer to this question is purely one of law. If the county unit statute providing an unequal classification of votes and an unwarranted discrimination against voters in the large counties is unconstitutional, the answer is "No." If the Court reaches the answer "No," injunction should follow as a matter of course to prevent the illegal action from being consummated. In no other way can the illegal result be prevented.

The case of *Bell v. Hood*, ... U.S. ....., 66 S. Ct. 773, advance sheet April 15, 1946, furnishes pertinent statements on the appropriate exercise of equity jurisdiction and we submit that under the principles there stated, plaintiffs find ample basis for relief. The following statements from that case are of special significance: "And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to *protect* rights safeguarded by the Constitution and to restrain individual state officials from doing what the Fourteenth Amendment forbids the State to do. Moreover, where federally protected rights have been invaded it has been the rule from the beginning that Courts will be alert to adjust the remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and a Federal statute provides for a general right to sue for such invasion, Federal Courts may use any available remedy to make good the wrong done." (Italics supplied.)

It is argued that this is a practice which has been followed since the passage of the statute in 1917 and apparently it is felt for some unaccountable reason this should provide some immunity from attack. But political peonage cannot be justified merely because it has been long existent. Wrong cannot be made right by long endurance. History lends no sanctity to a practice if that practice be in itself wrong. If

there are two or more legitimate ways to achieve an object of government then long practice of one may commit the people to a point where a group may not be heard to object, but that presupposes a course that is legitimate. If the practice is unlawful or the pretended law purporting to authorize it is unconstitutional, it is no less so after the lapse of time. It could with just as much reason be argued that since it had long been the practice to exclude Negroes from voting under the force of the statute, the Courts would not now disturb so long an established system. As was said by a distinguished Georgia jurist, Mr. Justice Lumpkin, in *James v. City of Blakely*, 143 Georgia 117, 84 S.E. 431, 433 "... an unconstitutional act cannot become a valid law by age. Unconstitutionality is not like minority, a thing which may be out grown in a few years."

The argument, if we are to be candid, always comes back to this: Plaintiffs have the undoubted right to vote on equality with other voters. They have with equal certainty been denied this right by statute. They are entitled to invoke the equal protection of the law. They are doing so. It is no answer to them to say that they may seek their remedy in the Political Department of the government. The very noose they now complain about prevents their securing such a remedy. The General Assembly through whom they would be required to look for relief, composed of a majority from the counties now enjoying the advantage complained about, could hardly be expected to voluntarily forego for themselves this advantage so long enjoyed.

The fact that results may have political implications affords no reason to deny relief if the parties are plainly entitled to it under the law. We are not asking a sedative, we are asking a cure. The fact that the remedy may be painful may be unfortunate but as pointed out by Mr. Justice Black in *Colegrove v. Green* it has the virtue that "it is constitutional." Every judicial landmark in the great unfolding history of the Courts has produced more than a ripple on the calm waters of an easy going, long suffering people. Only the judicial armor can give ample shield against these wrongs.

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VIII.

The District Court as constituted had the power and duty to declare the Act complained of unconstitutional whether or not Plaintiffs-Appellants were entitled to injunctive relief.

If, as we believe it has been demonstrated, the statute under attack violates the Constitution as claimed, it would seem also that plaintiffs had thus shown themselves entitled to relief from its consequences by the grant of injunction. Reluctant as we may be to leave the contention that injunction should as a matter of course follow the judicial death of the statute, it is nevertheless with equal earnestness urged that if the Court should determine, in the delicate handling of its own power, that injunction in the particular case should not be granted, the District Court should nevertheless have declared, and we submit this Court should now declare, the act unconstitutional. The District Court by its judgment and specifically in its conclusions of law held the statute to be valid. A dismissal or affirmance of this case would in effect sustain the constitutionality of the county unit law and thus furnish precedent and establish the basis of future discrimination in states in which the State Constitution omits an equal protection clause or where otherwise with such a ruling as authority, the same might be accomplished. In the terms of the Federal Declaratory Judgment Act Judicial Code, Sec. 274d, U.S.C.A. 28, Section 400, an actual controversy unquestionably existed. A judgment under the statute is authorized "whether or not further relief is or could be prayed." The further relief (in this case a decree enjoining defendants as prayed) may be granted whenever necessary or proper. It is not essential, however, to support or to authorize declaratory judgment that the further relief be actually approved or granted. This Court in dealing with an action brought under the Uniform Declaratory Judgment Act of Tennessee in the case of *N.C. & St.L. R.R. v. Wallace* 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730, held that "prayer for injunctive relief is not a necessary prerequisite of the judicial power, allegations of threatened irreparable injury, which are material only if an injunction is asked, may like-

wise be dispensed with if, in other respects, the controversy presented is . . . real and substantial" and Mr. Justice Stone in division 3 of the opinion in that case stated: "While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution, such relief is not an indispensable adjunct to the exercise of the judicial function, *Fidelity National Bank and Trust Company v. Swope* 274 U.S. 132, 47 S. Ct. Rep. 511, 71 L. Ed. 959. This Court has often exerted its judicial power to adjudicate boundaries between states although it gave no injunctive relief upon the determination of the legal rights which were the subject of controversy between the parties."

Again in the case of *Great Lakes Dredge & Dock Company v. Huffman* 319 U.S. 293, 63 S. Ct. 1070, 87 L. Ed. 1407, it was recognized that declaratory relief might be granted though injunctive relief denied, although dismissal of that case was affirmed because the parties, it was held, had adequate remedy under State laws. In *State of Texas v. State of Florida*, 306 U.S. 398, 59 S. Ct. 563, 83 L. Ed. 817, this Court approved declaratory judgment, although for reasons of policy, the power which the Court possessed to grant an injunction was not exercised and it was said in effect that the failure to exercise this function did not deprive the case of its character as a "case" or "controversy" cognizable by the Court.

There is much to be said for the application of that principle in this case if the Court were not to approve the grant of injunctive relief in spite of finding that the act was unconstitutional. There is no other way except by the kind of proceeding which plaintiffs adopted by which their rights could be tested or the statute appropriately challenged. They chose a tangible case where there was an actual controversy. They could not bring an action except at a time when their rights were being impaired. They could not simply pick out a good season of the year and file suit to have an abstract declaration made that the law was invalid. If they had brought the action before the primary, they would have been met with the claim that it was premature for the reason, among others, that they could not anticipate the harm or injustice which would result to them since the primary

could not be predicted. They could not wait until after the returns from the election had been filed and its results consummated. Therefore, they chose the only time and seized upon the only actual controversy where the question could properly be made. There was and is a judicial controversy. If their contention is sustained that the statute is invalid it prevents them from being forever foreclosed by an affirmance of a judgment, or its equivalent upon the order of dismissal having the same effect, which held the act constitutional. To leave the parties so situated would, we submit, amount to judicial sanction of admitted wrong. Such is not the high calling of equity.

IX.

Plaintiffs-Appellants have no adequate remedy at law by an action for damages or otherwise.

The above statement would hardly seem to need support in view of argument already presented on other phases of the question. The man of color when denied the right to deposit his ballot in the box may sue for damages. So might these plaintiffs if they had been thus denied, but since they are accorded the doubtful privilege of presenting and having accepted their ballot which then must go through a process of dilution, there is obviously no appropriate action at law which would afford relief. The wrong to them is not yet completed. We seek to arrest it before this is done, after which their question would become moot.

X.

Plaintiffs-Appellants are not estopped by their participation in the Primary Election.

While no express adjudication on the subject was made by the Lower Court, it was urged by the defendants in their answer that the plaintiffs by their participation in the primary in casting their ballot with knowledge of the provision of the statute and the party rules were estopped to claim relief from its consequences. Their situation is different from one where private parties litigate with each other and where familiar principles of estoppel may govern in reference to their conduct.

Quaker City Cab Co. v. Commonwealth of Pennsylvania 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927

James v. City of Blakely, 143 Ga. 117, 124 (84 S.E. 413)

Sellers v. Cox 127 Ga. 246 (2) (56 S.E. 284)

XI.

The present action insofar as it relates to the Secretary of State is not a "suit against the State."

Under a provision of the State Constitution[16] the Secretary of State, after the holding of the election is required to hold the ballots showing the result of voting and to trans-

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[16] Article V, Sec. I, Par. III of the Constitution of Georgia provides: "Returns of elections. The returns for every election of Governor shall be sealed up by the managers, separately from other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to the Secretary of State, who shall, without opening said returns, cause the same to be laid before the Senate on the day after the two houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives." Par. IV. provides: "How returns published. The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such a majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice.

mit them to the President of the Senate when the General Assembly convenes (next on January 13, 1947). This, of course, contemplates a lawful election with the name of the lawful candidate or nominee on the ballot. Therefore, since after the filing of the plaintiffs' petition and before the hearing by the three-judge Court, the time had expired by law for the name of any other candidate to be placed on the election ballots. Plaintiffs prayed for injunction against the Secretary of State to prevent him from transmitting the returns showing the name of a candidate so illegally nominated and chosen. Since such candidate was illegally nominated and since his name and his name only was placed on the ballot, already by virtue of this nomination there is no duty, as there normally would be, on the Secretary of State to take such action. Had the unconstitutional statute been ignored as it should have been, there was no candidate nominated and if the Secretary of State should perform the act of transmitting the returns of the election it would amount to no more than a consummation of the illegal process begun under the discriminatory statute. This relief against the Secretary of State was incidental to the main relief prayed for, to-wit, relief against the statute which abridged the plaintiffs' right to vote. There was no affirmative relief or recovery sought against the State. Two citizens for themselves and others in their class simply invoked the protection of the United States Constitution against the provisions of an act of its General Assembly; the wrong to them is not yet complete, it is still in progress; they seek to stop it before its consummation.

Where State officials purporting to act under State authority invade rights secured by the Federal Constitution, they are subject to the process of the Federal Courts in order that the persons injured may have appropriate relief. In such a case the suit is not against the State within the meaning of the State's immunity from suit.

Sterling v. Constantin, 287 U.S. 378, 53 S. Ct. 190, 193, 77 L. Ed. 375;

Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 442 449, 450, 451, 52 L. Ed. 714;

Smyth v. Ames, 169 U.S. 466, 18 S. Ct. 418, 42 L. Ed. 819.

Although a state may not be sued without its consent, nevertheless a state officer acting under color of his official authority may be enjoined from carrying into effect a State law asserted to be repugnant to the Constitution of the United States, even though such injunction may cause the state law to remain inoperative until the constitutional question is judicially determined.

Public Service Co. vs. Corboy, 250 U.S. 153, 39 S. Ct. 440, 63 Law Ed. 905.

From *Ex parte Young*, supra, at page 453, the following statement is authority for the position that the Secretary of State may be enjoined, even though the particular duty to be performed is imposed by the provision of some other act (in this case by the Constitutional provision shown in footnote No. 16, supra):

"In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party."

"It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (154 U.S. 362, 366, par. 19 of the Act) but that may possibly make the duty more clear; if it otherwise exists it is equally efficacious. The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is especially created by the act itself, is not material so long as it exists."

XII.

It is not too late to grant effective relief nor would it be an improper exercise of this Court's power to do so.

It is not too late for plaintiffs yet to be accorded effective relief by injunction. The only name for candidate for Governor which does or could under the unconstitutional statute appear on the General Election ballot is one which could not have appeared if the votes of plaintiffs and others in their class had been given the same weight or approximately the same weight as that of other voters. It is this gross discrimination and it only which resulted in this candidate being on the ballot and which resulted by operation of the statute in excluding others. While a primary election does not finally select the one to be Governor, it does in fact with certainty exclude from the possibility of being Governor all the members of the party holding the primary except one.

To enjoin the Secretary of State from taking this last administrative step, that is to prevent his transmission of the ballot, is not to supervise or police an election nor to impose an elective system upon the state nor to stop or interfere with any formal functioning of governmental agencies. It merely arrests a proceeding because when tested it has been condemned as violative of a provision of the United States Constitution.

The action of the Secretary of State, as one step in an election process, of transmitting votes to the State Senate is but the apex of a pyramid, of which the base was the nomination of a candidate by a primary election. If the primary election did not, in fact, result in the nomination of any one, because no one got a majority of the votes cast, then there is no base on which to construct the pyramid and the apex falls for lack of support.

Such an injunction need impose no controls, vest no supervision. The State is left utterly free so long as it does not violate the Federal Constitution. Its own organic laws provide for succession in office and no new legislation would be made mandatory by the grant of relief as prayed for. In this connection it should also be borne in mind, as already urged, that unless plaintiffs are granted the relief in this proceeding, they are entirely without remedy.

There may be delicacies and concern over the unfortunate necessity of taking judicial action in a Federal Court so

directly affecting a process which we normally think of as a State function but the same may as easily be said of many cases and we know of no higher judicial function than to preserve constitutional rights and liberties of the people. Again we say political peonage cannot be justified either by the lapse of time or further niceties of "jurisdictional fencing."

CONCLUSION

The use of further argument in concluding this brief could but add up to the following:

The Right:

Every registered elector in Georgia is entitled to vote.

The Discrimination:

A statute designed to reduce to practical ineffectiveness the votes of electors in the more populous counties.

The Grossness of Discrimination:

The vote of an elector in Fulton County has only 1/106 of the effectiveness of one in Chattahoochee County. The practical disenfranchisement of racial, religious, and industrial minorities in the metropolitan areas.

The Certainty of Application:

The particular election has been held, the results tabulated and is being consummated according to the discriminatory statute, which a three-judge Court has pronounced valid.

The Partial Remedy:

The Supreme Court to declare the statute invalid. This will at least limit the continuation of the wrong to the present term.

The Only Complete Remedy:

The Supreme Court to approve injunction.

BLEED THROUGH– POOR COPY

Respectfully submitted,

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APPENDIX

Exhibit 1: County outline Map of Georgia.

Exhibit 2: Georgia Gubernatorial Primary of July 17, 1946: Population per unit vote, for each county.

Exhibit 3: Georgia Gubernatorial Primary of July 17, 1946: Popular votes per unit vote, for each county.

Exhibit 4: Georgia Gubernatorial Primary of July 17, 1946: How the County Unit System Devalues certain votes. One Vote in Chattahoochee County was worth 106 votes in Fulton County.

Exhibit 5: Georgia Gubernatorial Primary of July 17, 1946: Percentage of Population and Unit Votes received by each candidate.

Exhibit 6: Georgia Gubernatorial Primaries of 1932 and 1942: Minimum popular votes required to win.

Exhibit 7: Georgia Gubernatorial Primaries of 1932-1942: Summaries of Returns.

EXHIBIT 1.

COUNTY OUTLINE MAP OF GEORGIA

Note: Under the county unit system, Georgia's 8 most populous counties have 6 unit votes each; the 30 next most populous, 4 unit votes each; and the remaining 121, 2 unit votes each. Total: 159 counties with 410 unit votes.

Source: Citizen's Fact-Finding Movement of Georgia, *Georgia Facts in Figures* (Athens: University of Georgia Press, 1946).